United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD KATZ, Trustee in Bankruptcy of
Foundry Company of Belleville, Illinois, Inc.,

Plaintiff-Appellant,

-against-

THE FIRST NATIONAL BANK OF GLEN HEAD,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF OF APPELLEE, THE FIRST NATIONAL
BANK OF GLEN HEAD

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Docket No. 76-7577

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Statement of Issues

The issues presented on this appea' are as follows:

1. Whether the district court properly held that the defendant bank's good faith receipt of the bankrupt's deposits to its general unrestricted checking account within four months of bankruptcy did not constitute transfers of the bankrupt's property within the meaning of Section 60 of the Bankruptcy Act, 11 U.S.C. §96.

2. Whether the district court properly held that the defendant bank's set-off against funds in the bankrupt's general unrestricted checking account two weeks prior to bankruptcy did not constitute a "transfer" of the bankrupt's property under Section 60 of the Bankruptcy Act.

3. Whether the district court properly held that there was no material issue of fact for trial because the plaintiff trustee had failed to make out prima facie case.

Statement of the Case

The appellant trustee in bankruptcy (the "Trustee") appeals from an order of the United States District Court for the Eastern District of New York, dated October 19, 1976, granting summary judgment under Fed. R. Civ. P. 56 dismissing the complaint. App.* 34-41. The Trustee had alleged in his complaint that The First National Bank of Glen Head (the "Bank") received a preferential transfer in the sum of $108,732.07, which was purportedly voidable under Section 60b of the Bankruptcy Act (the "Act"), 11 U.S.C. §96(b). App. 4-7. No other

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* All references to "App." are to the joint appendix on this appeal; numbers following "App." refer to the pages of the joint appendix.

claim for relief was made.

In essence, the Trustee claimed that the bankrupt, Oakland Foundry Company of Belleville, Illinois, Inc., ("Oakland" or the "bankrupt"), deposited the aggregate sum of $108,732.07 in its general unrestricted checking account at the Bank (the "Glen Head account") during the four-month period preceding the date of bankruptcy, July 15, 1971, and that "said deposits and transfers...were not made or accepted in the regular course of [the Bank's] business or in good faith...." App. 6. In addition, the Trustee claimed that the Bank's set-off of the funds in the bankrupt's account on June 30, 1971, approximately two weeks prior to bankruptcy, was "a [voidable] preference" because the Bank "knew or had reasonable cause to believe that Oakland was insolvent...." App. 6-7.

The Proceedings Below.

After extensive pre-trial discovery by both parties, including the Trustee's examination* of the bankrupt's principal officer and shareholder under Section 7a(10) of the Act, the district court found that the Trustee's allegations were without foundation in fact. App. 39-41. According to the district court, "there is nothing in the record by which the

* The Trustee examined the bankrupt's principal, Herman W. Brede, on October 12, 1971, almost two years prior to the commencement of this litigation. App. 184-211.

trustee could establish on a trial that these deposits were received by the bank in anything other than its ordinary course of business." App. 40. Under the applicable law, therefore, the district court dismissed the complaint, and held that "the bank had a right of set-off and its exercise thereof did not constitute a voidable preference." App. 39.

The Trustee's Distortion of the Undisputed Facts.

Because the Trustee's purported statement of facts is inaccurate, the material facts expressly admitted by the Trustee in his statement required by Rule 9(g)* of the Eastern District of New York, as set forth in the district court's opinion, are incorporated herein by reference. App. 34-36. An analysis of the Trustee's Rule 9(g) statement and of the opposing affidavit submitted by the Trustee's counsel discloses that the Trustee's denials in the district court and here are groundless. Thus, the Trustee denies sworn, uncontradicted testimony of the bankrupt's principal officer that Oakland

* Rule 9(g) of the Eastern District of New York requires the moving party on a motion for summary judgment under Fed. R. Civ. P. 56 to include in his motion papers "a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issues to be tried." See App. 21-24. The party opposing the motion must also file "a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." See App. 29-31. The facts set forth in the moving party's statement "will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." In this case, the Trustee expressly admitted the facts noted in the district court's opinion. App. 29-31.

had made substantial deposits in the Glen Head account "because several of the creditors [of Oakland] were trying to attach the funds in [the bankrupt's] St. Clair [Illinois bank account]." App. 22. His denial of this testimony, in the district court (App. 30) and here (Trustee's Brief, at 11), is not justified by any evidence in the record. Accordingly, the district court properly assumed that Oakland's deposits in the Glen Head account were made to "isolate funds from its [Oakland's] creditors...." App. 40.

Attempting to contradict the testimony which he elicited from the bankrupt's principal, the Trustee claims that "there were no judgment creditors of Oakland who were in a position to attach [the] St. Clair funds [in Illinois]", and that there was "only one suit...pending against Oakland" in 1971. (Trustee's Brief, at 11). On this basis, he argues that the Bank must have participated in a build-up of the Glen Head account because the bankrupt had no ostensible reason to deposit its funds with the Bank in New York. He reasons that creditors must have had judgments before they could attach Oakland's bank accounts in Illinois. But Oakland's Illinois creditors* could have attached its funds on deposit with an Illinois bank without first obtaining a judgment. Pre-judgment

* Because Oakland's principal place of business was in Illinois, and because its creditors filed an involuntary petition in bankruptcy against it in Illinois, it presumably had several creditors there.

attachment is widely used as a provisional remedy, and was available to creditors in Illinois. Ill. Ann. Stat. ch. 11, §1 (Smith-Hurd Supp. 1977) (Attachment may issue at time of instituting suit). See generally, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 610 (1975).

There is also no basis for the Trustee's denial of the bankrupt's sworn, uncontradicted testimony that it "used the Glen Head account in the normal course of its business, paying its accounts payable on a regular basis from that account." App. 22. The Trustee concedes that from "January 6, 1970 until April 15, 1971, 'at least 260 checks' were drawn on the account," (App. 30), but offers no admissible evidence to contradict this fact.

To support his spurious claim that the bankrupt's principal officer, Brede, "had been in close contact with the Bank respecting Oakland's obligation...during the few months immediately preceding the set-off" (Trustee's Brief 6), the Trustee relies on his own self-serving answers to the Bank's interrogatories and upon his own vague testimony which was admittedly based on hearsay. Specifically, the Trustee stated in his interrogatories that:

> "26. Upon information and belief Herman Brede was in contact with the defendant's officer prior to June 29, 1971 and advised them [sic] of Oakland's financial condition. Information is based on informal discussions with Nancy Woodford and Herman Brede." (App. 15) (emphasis supplied).

Again, at his deposition, the Trustee testified as follows:

"...When I was appointed trustee for Oakland Foundry, there was an employee...who was still there; I don't know why she stayed that long, to be honest with you, but she seemed to be a general office manager, and she told me just in passing when she left and I came that people from the bank had been talking with Mr. Brede for several months prior to the bankruptcy and they were very concerned about their loan. That's all." (App. 16).

Significantly, the Trustee never even offered an affidavit by the former employee of the bankrupt, and gave no details about the employee's conversations with the Bank during the period preceding bankruptcy. Nor is there any indication of which bank was mentioned.

In fact, the only officer of the Bank who had actual knowledge of the facts testified at his deposition as follows:

"Q. Did you have any understanding with Mr. Brede with respect to those deposits on the part of Oakland?

"A. None whatever.

"Q. Did you have any conversation with Mr. Brede in that regard?

"A. No.

"Q. Did he ever advise you during the early or middle part of 1971 that he was going to make deposits with the Glen Head bank?

"A. No.

"Q. So to your knowledge, the deposits to the extent of about $100,000...which were made during the winter and spring of 1971 with the defendant bank, were deposits made without any prior conversations with Mr. Brede or anyone on the part of Oakland?

"A. Without any conversation.

"Q. Without any prior understanding on his part and your part with respect to the making of such deposits?

"A. Without any understanding.

"Q. These monies were deposited with your knowledge or without your knowledge at the time they came in?

"A. Without my knowledge.

* * *

"Q. Well, did you have any conversations with [Brede] in this regard?

"A. No.

"Q. He did not at this time travel between Belleville, Illinois and his home in...New York?

"A. This I don't know. But he didn't stop in to see me or call or see me.

"Q. He didn't stop in in 1971 at all?

"A. Speak to me?

"Q. Yes.

"A. That I recall, no."

(App. 136-37).

Mr. Brede, the president of the bankrupt, also testified in response to questions by the Trustee's counsel as follows:

"Q. During the months prior to bankruptcy had you been in contact with The First National Bank of Glen Head concerning your sale of the building?

"A. No. About the only contact I had was right towards the end in June or July. I got all the people together here in Belleville and told them that we were in financial trouble and I called the bank up in New York and told them that we were in financial trouble." (App. 190) (emphasis supplied).

Thus, the only two persons with personal knowledge of the facts contradicted the Trustee's distorted interpretation, which is based, at best, on inadmissible evidence. And more important, the testimony of both individuals is consistent.

The Trustee's Glaring Lack of Evidence.

Not only has the Trustee misstated the controlling issues here, but he has also failed to make out a prima facie case. He alleges without any factual basis that Oakland's deposits to its account at the Bank were not made in the ordinary course of business. There is nothing in the record, however, which even tends to show collusion between Oakland and the Bank for the purpose of making a preferential transfer of Oakland's property. Indeed, it is undisputed that a debtor-creditor relationship existed between the Bank and Oakland, which enabled Oakland to withdraw funds from the Glen Head account at will, as the district court properly noted. App. 35 (Based on ¶6 of the Bank's Statement of Material Facts under Eastern District Rule 9(g), which the Trustee expressly admitted.) ("The Glen Head account was a general account, and there were no restrictions on Oakland's right to make withdrawals."); see also App. 40. Accordingly, because of the Trustee's failure to show collusion between Oakland and the Bank, or that the Bank accepted Oakland's deposits other than in the ordinary course of its business, the district court properly held that the Bank could not be held

liable.

The Trustee's fictionalized presentation of the record below also mistakenly relies on assumptions made by the district court "[f]or purposes of...[the Bank's] motion." App. 37. For example, the district court merely "assumed that at the time of the set-off Oakland was insolvent...." App. 37. Even with this assumption, the district court reached the correct result. But the lower court's assumptions are not findings of fact, as the Trustee suggests (Trustee's Brief, at 12-13, 23-24). The record is utterly devoid of evidence showing that Oakland was insolvent at the material times. The Bank called this to the attention of the district court. (Bank's Opening Brief in Support of Motion for Summary Judgment, at 4-5; Bank's Reply Brief, at 3-4). In making the assumptions it did, however, the district court properly decided the Bank's motion, primarily because the Trustee's claim against the Bank could have been dismissed on a number of alternative grounds.

I.

THE DISTRICT COURT PROPERLY HELD THAT THE BANKRUPT'S DEPOSITS DURING THE FOUR MONTH PERIOD PRECEDING BANKRUPTCY WERE NOT PREFERENTIAL TRANSFERS.

A. There Was No Transfer Under Section 60 of the Bankruptcy Act.

The Trustee contends that Oakland's deposits with the Bank during the four-month period preceding bankruptcy

were preferential transfers voidable under 60b of the Act.* App. 6. Section 60a of the Bankruptcy Act defines a "preference" as follows:

> "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

Section 60b of the Act provides in relevant part that "[a]ny such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent."

Thus, while Section 60a defines a preference, Section 60b sets forth the necessary conditions under which a preference may be challenged by a trustee in bankruptcy.

> "Briefly stated, the elements of a preference under §60a consist of the following: a debtor (1) making or suffering a transfer of his property, (2) to or for the benefit of a creditor,

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* The Trustee also contends that the Bank's set-off on June 30, 1971, was a voidable preferential transfer. App. 6. Although the Trustee's allegations are somewhat confusing, the validity of the June 30, 1971 set-off will be confirmed in section II, infra.

> (3) for or on account of an antecedent debt [resulting in a depletion of the estate], (4) while insolvent, and (5) within four months of bankruptcy..., (6) the effect of which transfer will be to enable the creditor to obtain a greater percentage of his debt than some other creditor of the same class.... However, under... [§60b] a preference is voidable by the trustee in bankruptcy only upon proof of the additional element that (7) the creditor receiving or to be benefited by the preference had reasonable cause to believe that the debtor was insolvent. If any one of the elements of a preference as enumerated in §60a is wanting, there is no necessity of considering an avoidance under the terms of §60b, since a preference under the terms of §60 itself has not been established. Thus a transfer lacking any element (1)-(6), supra, is unassailable as a preference....
>
> "On the other hand, where a preference as defined in §60a is found to exist, there can, nevertheless, be no avoidance of such a preference under §60b unless the transferee had reasonable cause to believe that the debtor was insolvent. In all such cases, the burden of proving the existence of these essential elements is upon the trustee seeking to avoid the transfer."

3 Collier, Bankruptcy ¶60.02, at 758-60 (14th rev. ed. 1976).

Oakland's deposits to its account at the Bank were not "transfers" under Section 60 of the Act and cannot be considered voidable preferences, as the Trustee contends. In New York County Nat'l Bank v. Massey, 192 U.S. 138 (1904), the plaintiff trustee claimed that the defendant bank had received a preference when it set off its insolvent depositor's

funds. The Supreme Court of the United States rejected the trustee's contention, holding that a deposit of money to one's credit in a bank does not diminish the depositor's estate.

> "[A] deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift or security."

192 U.S. at 147 (emphasis supplied). Thus, because one essential element of a preferential transfer was lacking, namely, a transfer of the debtor's property, the bank's set-off of the deposited funds was upheld.

Similarly, in Citizens' Nat. Bank v. Lineberger, 45 F.2d 522 (4th Cir. 1930), the plaintiff trustee in bankruptcy asserted that the defendant bank's set-off after bankruptcy constituted a voidable preference, primarily because the bank knew of the depositor's insolvency when deposits were made into the depositor's checking account. Holding that the defendant bank was entitled to set off the monies on deposit against the debtor's indebtedness, and relying on the Supreme Court's decision in New York County Nat'l Bank v. Massey, supra, the court reasoned as follows:

> "An ordinary deposit in a bank...is not a 'transfer'... [under] section 1(25) of the Bankruptcy Act, 11 USCA §1(25)[now section 1(30)].... A deposit in a bank is not a sale or parting with

> property, or its possession, as a payment, pledge, mortgage, gift, or security. It does not deplete the estate of the depositor, but results in substituting for currency, bank notes, checks, drafts, and other bankable items a corresponding credit with the bank, which may be checked against, and which provides the depositor with the medium of exchange in universal use in the transaction of business. A deposit of funds differs from a payment in the essential particular that it is withdrawable at the will of the depositor. Of course a deposit may be made the cloak for some other transaction, such as payment or the giving of security; and in such case equity, which looks through form to substance, will treat the transaction according to its real nature. But if the deposit is in reality a deposit, made in good faith as such, subject to the withdrawal of the depositor, and not made as a cloak for a payment or other forbidden transaction, it is not a transfer within the meaning of the Bankruptcy Act and cannot be attacked as preferential, even though it may have been made when the depositor was insolvent, and even though the bank, by applying it as a set-off, may have obtained a greater percentage on a debt which it holds against its insolvent depositor than his other creditors can obtain."

45 F.2d at 527-28 (emphasis supplied); accord, 3 Collier, Bankruptcy ¶60.07[1], at 791 (14th rev. ed. 1976). See also Joseph F. Hughes & Co. v. Machen, 164 F.2d 983, 986-88 (4th Cir. 1947), cert. denied, 333 U.S. 881 (1948). Furthermore, "in the absence of fraud or collusion between the bank and the depositor, with a view of creating a preferential transfer, the bank need not surrender the balance in the bank account at the time of the filing of the depositor's petition in bankruptcy, but may set it off against the depositor's indebtedness...."

Ingram v. Bank of Cottage Grove, 29 F.2d 86, 87 (9th Cir. 1928); accord, New York County Nat'l Bank v. Massey, supra, 192 U.S. at 148-49 (1904); Matters v. Manufacturers' Trust Co., 54 F.2d 1010, 1013 (2d Cir. 1931) ("...[I]f there is to be a recovery, the bank must understand that the account is being built up so as to be available at the proper time for seizure.").

The foregoing authorities confirm that Oakland's deposits to its account at the Bank, even if made while Oakland was insolvent during the four-month period preceding bankruptcy, were not transfers within the purview of Section 60a of the Act. The Trustee has failed to produce any evidence that the deposits in the Glen Head account were the result of collusion or fraud between Oakland and the Bank. In fact, when the bankrupt's president was asked by the Trustee's counsel* if he "had...been in contact with the [Bank]...during the months prior to bankruptcy," he testified as follows: "No. About the only contact I had was right towards the end in June or July...and told them that we were in financial trouble." App. 190. It is undisputed that as a result of this conversation on June 29, 1971, the Bank, on June 30, 1971, set off Oakland's funds in the Glen Head Account...." App. 23, 28,

* The testimony of the bankrupt's principal was attained by the Trustee almost two years prior to the commencement of the Trustee's suit against the Bank. Such ante litem testimony should be given great weight. See In re Carnera, 6 F. Supp. 267, 269 (S.D.N.Y. 1933).

190-91. Thus, there is no evidence of any collusion between Oakland and the Bank prior to or at the time Oakland deposited funds in the Glen Head account. It is incontrovertible that such deposits were accepted by the Bank in the ordinary course of its business and in good faith. The trustee has admitted that Oakland could and did withdraw at will funds from its checking account at the Bank. App. 22, 30. Indeed, the Trustee has never shown that the Bank placed any restrictions whatsoever on the Glen Head account. Accordingly, the Trustee's voidable preference claim is without merit, for an essential element of a preference under Section 60a is lacking, namely, a transfer.

B. The Intent of the Bankrupt is Immaterial.

The Trustee argues that a "set-off may be attacked as a voidable preference if the Bankrupt deposited the funds in question other than in the ordinary course of its business, intending a transfer...." Trustee's Brief, at 14. The bankrupt's intent when making the deposits here is not a material consideration, however, in determining whether there was a preferential transfer. "[T]he debtor's intent or motive is not a material factor in the consideration of an alleged preference under 60.... [I]t is the effect of the transaction, rather than the debtor's intent, that is controlling." 3 Collier, Bankruptcy ¶60.02, at 761 (14th rev. ed. 1976); Alexander v. Redmond, 180 F. 92, 95 (2d Cir. 1910), appeal

dismissed, 227 U.S. 683 (1913) ("We do not think the 'intent' of ... [the debtor] is material because the statute expressly provides that a transfer by an insolvent person within the four-months period shall be deemed to be a preference, if its effect will be to enable any creditor to obtain a greater percentage than others of his class."); Cohen v. Goldman, 250 F. 599, 601 (1st Cir. 1918) ("But since the amendment [of 1910] the intent of the bankrupt in making the transfer is immaterial...."); Golden Hill Distilling Co. v. Logue, 243 F. 342, 347 (6th Cir. 1917) ("[T]he amendment of 1910 provided that the debtor's intent was no longer relevant...."); In re Gaylord, 225 F. 234, 238 (N.D.N.Y. 1915) ("I do not see that the intent of the debtor is of any consequence, as the Bankruptcy Act now, since the amendments of 1910, reads. The statute, as it now reads, does not concern itself with the intent of the debtor in giving the transfer."); Heyman v. Third Nat. Bank, 216 F. 685, 688 (D.N.J. 1914) ("Intent to prefer, since the amendment of 1910, is no longer material. The effect of the transaction is substituted for the intent of the debtor.")

Frankford Trust Co. v. Comber, 68 F.2d 471 (3d Cir. 1933), cited at p. 15 of the Trustee's brief, is inapplicable here. In Frankford Trust the court erroneously cited Matters v. Manufacturers' Trust Co., 54 F.2d 1010 (2d Cir. 1931), as a decision under the Bankruptcy Act. The court in Matters drew a clear distinction between decisions under the Bankruptcy

Act and under state law.*

> "Deposits in a bank which holds a depositor's paper, may be a preference under section 15 (Stock Corporation Law N.Y. ...); we so held in Kolkman v. Mfrs. Trust Co., 27 F(2d) 659. The defendants in effect ask us to overrule that decision, relying upon New York County Nat'l. Bank v. Massey, 192 U.S. 138 ...; Studley v. Boylston Nat'l. Bank, 229 U.S. 523 ...; our own decision in Murray v. Corn Exchange Bank (D.C.) 31 F.(2d) 373, affirmed (C.C. A.) 31 F.(2d) 375, and several other decisions. It is true, as these hold, that a deposit made in ordinary course of business, over which the depositor means to keep full control, is not a preferential transfer. The Bankruptcy Act (11 USCA) and section 15 after its amendment (Laws 1929, c. 653) charge the transferee only when in privity with the transferor; and, in a case like this, if there is to be a recovery, the bank must understand that the account is being built up so as to be available at the proper time for seizure. However, under section fifteen before its amendment no proof of such participation was necessary, and it was enough that the depositor alone intended not to use his right of withdrawal until the bank's right ended it. The deposit becomes a transfer because the depositor means it to be such; that is, he means not to exercise his right of withdrawal as to all of it, but to leave some part until that right is gone. It is not necessary that the residue shall be determinable in advance; no more need appear than that some part shall be left. When this is so the deposit is not in ordinary course; the part unused becomes a preferential payment when seized by set-off."

54 F.2d at 1013 (emphasis supplied). Thus, under the Bank-

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* The Trustee is relying exclusively here on Section 60 of the Bankruptcy Act.

ruptcy Act, a defendant bank can be held liable "only when in privity with the transferror...." It is not the intent of the bankrupt in making the deposits that is material, but only the bank's understanding "that the account is being built up so as to be available...for seizure." No such understanding existed here, and the Trustee has offered no evidence to support such a finding.

Likewise, Goldstein v. Franklin Square Nat'l Bank, 107 F.2d 393 (2d Cir. 1939), cited at pp. 19-20 of the Trustee's brief, supports the district court's holding here.

> "Deposits accepted by a bank with intent to apply them on a pre-existing claim against the depositor rather than to hold them subject to the depositor's checks in ordinary course are given their intended effect when so applied, that is to say, they are payments on account of the debt; and if they were made when the depositor was insolvent and within four months of bankruptcy, with knowledge or reasonable cause to believe on the bank's part that the depositor was insolvent, they are recoverable by a trustee in bankruptcy as voidable preferences."

107 F.2d at 394 (emphasis supplied). On remand, the district court in Goldstein v. Franklin Square Nat'l Bank, 31 F. Supp. 66 (E.D.N.Y. 1940), held that the defendant bank had not received a voidable preference, reasoning as follows:

> "[T]he defendant [bank] in receiving the deposits...is not shown to have intended to apply them in payment or setoff against the notes held by it, but is shown to have received them and handled them in due course; and...the defendant [bank] is not

> shown to have known or had reasonable cause to believe that the bankrupt was insolvent on [the] days [when deposits were made]...."

31 F. Supp. at 71. The foregoing analysis is directly applicable to this case. Indeed, the Trustee has not offered one shred of evidence to the contrary.

In Mayo v. Pioneer Bank & Trust Co., 270 F.2d 823 (5th Cir. 1959), cert. denied, 362 U.S. 962 (1960), cited at p. 14 of the Trustee's brief, the proceeds received on a contract, purportedly pledged to the bank, were immediately transferred by debit memorandum "solely to repay the loan" from the defendant bank which had reasonable cause to believe the depositor was insolvent at that time, "and the depositor was in fact insolvent." 270 F.2d at 836. No such facts exist here.

Cusick v. Second National Bank, 115 F.2d 150 (D.C. Cir. 1940), cited at pp. 14-15 of the Trustee's brief, is relied on for the proposition that the bankrupt's intention to facilitate the bank's set-off is material. The court in Cusick, however, affirmed the district court's directing a verdict for the defendant bank because "at the time of the deposits, the Bank had no reasonable cause to believe the... [bankrupt] insolvent...." 115 F.2d at 155. McGuigan v. Dime Bank Title & Trust Co., 47 F.2d 760 (M.D. Pa. 1931), also cited at pp. 17-18 of the Trustee's brief to show that the depositor's intent is material, merely held that a bank could

set off a good faith deposit against its depositor's debt. In dismissing the complaint, the court found that "[t]he money was placed in the bank as a bona fide deposit." 47 F.2d at 762.

Blue v. Herkimer Nat'l Bank, 30 F.2d 256 (2d Cir. 1929), cited at p. 21 of the Trustee's brief, is easily distinguishable. There, the monies were collected and deposited by the defendant bank in a special bank account "for the purpose of" being applied against the maturing notes of the bankrupt. 30 F.2d at 259.

> "It [the bank] had full knowledge of the bankrupt's financial condition from the statement furnished, and from its method of handling his moneys when received in payment of the contract it displayed a desire to protect itself. To a considerable extent, the defendant took supervision of his finances in carrying out his contracts. It had reasonable cause to believe that it was obtaining an advantage over the creditors, and is chargeable with the intent of creating a preference for itself."

30 F.2d at 260 (emphasis supplied). In the instant case, the Bank had no control over the business or the checking account of the bankrupt, and the Trustee wisely refrains from so suggesting. Indeed, he admitted that the "Glen Head account was a general account, and there were no restrictions on Oakland's right to make withdrawals." App. 22, 30.

Similarly, in In re Almond-Jones Co., Inc., 13 F.2d 152 (D. Md. 1926), aff'd sub nom. Union Trust Co. v. Peck, 16 F.2d 986 (4th Cir.), cert. denied, 273 U.S. 767 (1927),

cited at p. 22 of the Trustee's brief, "both the [defendant] bank and the bankrupt... intended...that the deposits should be applied [by the bank]...." 13 F.2d at 157. The Bank had no such intent here when Oakland made its deposits, and none has been shown. On the contrary, the Trustee admits that checks were drawn on the Glen Head account by Oakland. Trustee's Brief, at 7-8.

Hood v. Brownlee, 62 F.2d 675 (4th Cir. 1933), cited at p. 16 of the Trustee's brief, did not hold that the bankrupt depositor's intent is material. Rather, the court merely considered whether the deposits made by the Trustee and "the debt of the bankrupt...were... mutual debts or credits within the meaning of Section 68 of the Bankruptcy Act." 62 F.2d at 676.

C. The Ordinary Course of the Bank's Business Governs Here.

The district court stated the applicable rule governing this case.

> "The test is not whether the deposits were made in the depositor's regular course of business, but instead, whether they were accepted by the bank in its regular course of business."

App. 40. The Trustee has not cited a single case holding that the bankrupt's course of business is determinative. On the contrary, the cases cited by the Trustee confirm that when the bankrupt's deposits are subject to withdrawal at will, there is no transfer to the bank.

The reasoning of Bank of Commerce v. Hatcher, 50 F.2d 719 (4th Cir. 1931), cited at p. 17 of the Trustee's brief, supports the district court's holding here.

> "It is perfectly clear that the transaction here involved did not constitute a deposit in regular course of business. The distinghishing characteristic of such a deposit is that it creates a balance in favor of the depositor which is subject to withdrawal at his will. Here the deposit lacked absolutely this characteristic. It was intended by the bankrupt to provide for the payment of certain checks which were presented for approval, not to create a balance in the bank subject to its [i.e., the bankrupt's] control. It was received by the bank, not for the purpose of creating such balance, but for the purpose of being applied on the pre-existing indebtedness of the bankrupt. The balance created was at no time subject to the withdrawal of the bankrupt and was promptly applied by the bank upon the bankrupt's indebtedness."

50 F.2d at 721 (emphasis supplied). Here, it is undisputed that Oakland's deposits were "subject to withdrawal at...will," and are, therefore, not assailable.

Saperstein v. First Security Bank, 24 Utah 2d 66, 463 P.2d 546 (1970), cited at p. 22 of the Trustee's brief, is also distinguishable because the bankrupt's deposits were immediately set off by the defendant bank and were never subject to withdrawal by the bankrupt. 465 P.2d at 548. In fact, the defendant bank had made inquiries about and learned of the bankrupt depositor's insolvency prior to the deposits. 465 P.2d at 547. Indeed, "[t]he court...found that the deposits ...were not made and received in the ordinary course of the Bank's business." 465 P.2d at 548 (emphasis supplied).

II.

THE TRUSTEE FAILED TO MAKE OUT A PRIMA FACIE CASE.

The Trustee argues that the Bank failed to appeal from the district court's assumption that the bankrupt was insolvent. Trustee's Brief, at 12.* In this way, he hopes to overcome his failure to prove insolvency in response to the Bank's motion. Although the district court merely "assumed that at the time of the set-off Oakland was insolvent...[f]or purposes of [the Bank's] motion," it never found that Oakland was insolvent. Moreover, the Bank may assert on appeal any ground in support of the judgment rendered by the district court.

> "[I]t is...settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

United States v. American Railway Express Co., 265 U.S. 425, 435 (1924); Dandridge v. Williams, 397 U.S. 471, 475, n.6 (1970) ("The prevailing party may, of course assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the

* "No cross appeal has been taken as to the District Court's assumptions respecting Oakland's insolvency and the Bank's grounds for believing Oakland to be insolvent." Trustee's brief, at 12.

trial court."); 9 Moore's Federal Practice ¶204.11[3], at 933 (2d ed. 1975) ("[I]f the appellee is fully satisfied with the judgment actually rendered, he need not take his own appeal, even though he wishes to argue on appeal, in support of the judgment, that the district erred with respect to particular rulings or the reasons for the judgment.").

The district court made no error here, and did not have to decide whether the Trustee met his burden of proving insolvency. But the record confirms that the Trustee submitted no evidence whatsoever that Oakland was "insolvent" or that the Bank had "reasonable cause to believe that [Oakland was] insolvent," as required by Section 60.

The Trustee asserts, solely on the basis of the district court's limited assumption, that the "Bank...had reasonable cause to believe Oakland to be insolvent at the time the deposits were made...." Trustee's Brief, at 24. The Trustee has equated the "financial difficulties" of Oakland with reasonable cause by the Bank to believe Oakland was insolvent, but this does not comply with the statutory requirement. 3 Collier, Bankruptcy ¶60.53[2], at 1066.1-66.2 (14th rev. ed. 1976) ("Apprehension or suspicion on the part of the creditor is not sufficient to constitute 'the reasonable cause to believe' which is required by §60b of the Act."); Everett v. Warfield Mining Co., 37 F.2d 328, 330 (4th Cir. 1930) ("A creditor may feel anxious about his claim and have

a strong desire to secure it or have it paid, and yet not have such a belief as the act requires. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by the law."). The Trustee has not pointed to any evidence that shows the Bank believed Oakland to be insolvent prior to the set-off on June 30, 1971. In fact, Oakland's president, testified in response to the Trustee's questions as follows: "Q.... Were you advising them that you were insolvent at the time, that you just couldn't pay back the loan? A. No, I advised them basically that I was going to talk to other creditors and tell them that I was in trouble and that I was still trying to work my way out of it." App. 192.

The Trustee's failure to meet his burden of proof was fatal, as the district court held.

> "If any one of the elements of a preference as enumerated in §60a is wanting, there is no necessity of considering an avoidance under the terms of §60b, since a preference under the terms of §60 itself has not been established. Thus, a transfer lacking any element...is unassailable as a preference ....
>
> "...In all such cases, the burden of proving the existence of these essential elements is upon the trustee seeking to avoid the transfer."

3 Collier, Bankruptcy ¶60.02, at 759-60 (14th rev. ed. 1976). Because of the Trustee's failure to meet his burden here, the complaint was properly dismissed. Bumb v. Valley Electric Co.,

419 F.2d 107, 108 (9th Cir. 1969); Mayo v. Pioneer Bank & Trust Co., 270 F.2d 823, 835 (5th Cir. 1959), cert. denied, 362 U.S. 962 (1960).

III.

THE DISTRICT COURT CORRECTLY HELD THAT THE BANK WAS ENTITLED, AS A MATTER OF LAW, TO SET OFF THE FUNDS IN THE BANKRUPT'S ACCOUNT.

A. The Bank's Set-off Was Proper.

Section 68a of the Bankruptcy Act, 11 U.S.C. §108a, provides as follows:

> "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

The Supreme Court of the United States confirmed a bank's right to set off funds in a bankrupt depositor's account in New York County Nat'l Bank v. Massey, 192 U.S. 138 (1904), and in Studley v. Boylston Nat'l Bank, 229 U.S. 523 (1913).

In the Massey case, supra, the bankrupts made deposits after they had become insolvent and after they had furnished the defendant bank with a statement showing their insolvency. After the depositors had been adjudged bankrupt, the defendant bank set off the balance on deposit against the depositors' indebtedness. Rejecting the plaintiff trustee's contention that the bank's set-off was a voidable preference, the court held as follows:

> "It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character.... It is true that the findings of fact in this case establish that at the time these deposits were made the assets of the depositors were considerably less than their liabilities, and that they were insolvent, but there is nothing in the findings to show that the deposit created other than the ordinary relation between the bank and its depositor."

192 U.S. at 145. After holding that a deposit in one's bank account is not a "transfer" under Section 1(30) of the Act (Section I, supra), the court explained why a bank's set-off of a depositor's account is not a voidable preference under Section 60 of the Act.

> "It is true that [a deposit in one's bank account] creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68a. If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and en-

> forced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full.
>
> "....
>
> "...It is true, as we have seen, that in a sense the bank is permitted to obtain a greater percentage of its claims against the bankrupt than other creditors of the same class, but this indirect result is not brought about by the transfer of property within the meaning of the law. There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

192 U.S. at 147-48. In this case, the Bank may ultimately obtain a greater percentage of its claim against the bankrupt than other creditors of the same class. But the reasoning of the Massey case, supra, demonstrates that such a possibility does not make the Bank's set-off voidable.

The Supreme Court of the United States also upheld a bank's set-off in Studley v. Boylston Nat'l Bank, supra. Rejecting the plaintiff trustee's contention that "the parties...voluntarily made the set-off before the petition [in bankruptcy] was filed," the Supreme Court noted that Section 68a

> "did not create the right of set-off but recognized its existence and provided a method by which it could be enforced even after bankruptcy....[W]hat business men call set-off, is a right given or recognized by the commercial law of each of the States and is protected by the Bankruptcy Act if the petition is filed before the parties have themselves given checks, charged notes, made book entries, or stated an account whereby the smaller obligation is applied on the larger.
>
> "...If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the Trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the Trustee. But there is nothing in §68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted."

229 U.S. at 528-29 (emphasis supplied).

As a result of the bankrupt's deposits, the Supreme Court noted in the Studley case, supra, that the defendant bank was indebted to the bankrupt as a depositor, but that the bankrupt, on the other hand, was indebted to the bank on various promissory notes. Finding that these obligations were mutual debts, the Court rejected the Trustee's challenge to the set-off, reasoning as follows:

> "The Bankruptcy Act recognizes [the] right [of set-off] and it cannot be taken away by construction because of the possibility that it may be abused. The remedy against that evil is found in the fact that the Trustee is authorized to sue and recover if it is shown that after insolvency the

> money was deposited for the purpose of enabling a bank or other creditor to secure a preference. But to deny the right of set-off, in cases like this, would in many cases make banks hesitate to honor checks given to third persons, would precipitate bankruptcy and so interfere with the course of business as to produce evils of serious and far-reaching consequence."

229 U.S. at 529; accord, Matters v. Manufacturers' Trust Co., 54 F.2d 1010, 1013 (2d Cir. 1931) ("It is true...that a deposit made in ordinary course of business, over which the depositor means to keep full control, is not a preferential transfer. The Bankruptcy Act (11 USCA)...charge[s] the transferee [bank] only when in privity with the transferor; and,...if there is to be a recovery, the bank must understand that the account is being built up so as to be available at the proper time for seizure."); Jensen v. State Bank, 518 F.2d 1, 4 (8th Cir. 1975) ("Under the Bankruptcy Act, no voidable preference is ordinarily created when a bank sets off funds in an account of general deposit with it against a debt owed to it by the depositor."); 4 Collier, Bankruptcy ¶68.16[2], at 918-20.1 (14th rev. ed. 1975) ("[W]here an insolvent depositor makes general deposits within four months of his bankruptcy, which deposits are accepted in good faith and in the regular course of business, the bank has a right to set off such deposits against an obligation owing to it by the depositor....It is only where affairs have reached such a point that the bank accepts the deposit for the purpose of payment,

or of giving itself a subsequent advantage over other creditors...that the deposit and subsequent application of it amounts to a recoverable preference.").

Likewise, Farmers Bank v. Julian, 383 F.2d 314 (8th Cir.), cert. denied, 389 U.S. 1021 (1967), cited by the district court (App. at 38-39) and by the Trustee (Trustee's Brief, at 22), supports the Bank here.

> "A bank account at the time of filing the petition in bankruptcy is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt, the bank may set the account off against any indebtedness owed it by the bankrupt....
>
> "The bank has the right to set off deposits against indebtedness even though the bankrupt is insolvent at the time of setoff and before the petition in bankruptcy is filed."

383 F.2d at 324. The Trustee fails to distinguish any of the foregoing authorities from this case. Indeed, he cannot.

The Bank's purported knowledge of Oakland's insolvency when it set off the funds in the Glen Head account is not determinative of this case, as the Trustee argues. Trustee's Brief, at 20-21. In Plymouth County Trust Co. v. MacDonald, 60 F.2d 94 (1st Cir. 1932), the indebtedness of the bankrupt was evidenced by time notes which were converted to demand notes in March of 1927. In June 1929, a meeting of shareholders of the bankrupt was held, and attended by the president of the defendant bank. At that time, the share-

holders voted to allow the bankrupt to continue in business for three more months, and no objection was made by the president of the defendant bank. The bankrupt continued to make deposits with the defendant bank after the shareholders' meeting. According to the court,

> "[I]t does not follow because a bank knows that a depositor is insolvent that the application of funds on deposit in a checking account to a claim against the depositor constitutes a preference. A bank is permitted to apply funds on deposit, and received in the usual course of business, to a claim against the depositor under section 68 of the act (11 USCA § 108) relating to set-offs."

60 F.2d at 96. The defendant bank in MacDonald continued to receive and honor checks until July 12, 1929, when the bank determined that it would no longer honor checks of the bankrupt and set off the deposited funds against the outstanding notes. The court stated:

> "The deposits making up the $4,027.29 applied on July 12th [which had been deposited on July 10], were made with the understanding on the part of the depositor that they were subject to be withdrawn on its checks for a period of at least three months, and were received by the bank with the same understanding. The record discloses no intent on the part of the bank on receiving deposits prior to July 10th to apply them on its note, but rather an intent to hold them subject to check, and they were, of course, deposited by the bankrupt, to be drawn against as needed in conducting its business. The acceptance by the bank of the checks for $15,100.78 on the 12th, and all other checks or drafts col-

> lected on or after that date, were not received and accepted by the bank with any intent on its part to hold them subject to check, but with the obvious intent to apply them on its claim and to gain an advantage over other creditors, which constituted a preference."

60 F.2d at 97 (emphasis added); accord, In re Wright-Dana Hardware Co., 212 F. 397, 401 (2d Cir. 1914) ("A bank may do business in the usual manner with one it knows to be insolvent. The mere fact of insolvency, or mere knowledge of the insolvency of the depositor, is not alone sufficient to take away the bank's right of set off."); 3 Collier, Bankruptcy ¶60.15, at 826 (14th rev. ed. 1976) ("[T]here is nothing in the [Bankruptcy] Act which prevents an insolvent from conducting his business in the usual way, or prohibits banks from dealing with him on that basis."). See generally, Justman, Comments on the Bank's Right of Set-Off under the Proposed Bankruptcy Act of 1973, 31 Bus. Law. 1607, 1608-09 (1976).

In the instant case, Oakland's deposits were made to an unrestricted checking account and could have been withdrawn at any time. App. 22. Moreover, the balance in Oakland's account prior to the set-off on June 30, 1971, was established by 19 separate deposits totalling approximately $108,000 which were made during the four-month period preceding bankruptcy. App. 23. Not only was business conducted in the usual way by Oakland and the Bank, but there is also no evidence even tending to show that the Bank accepted Oakland's deposits with an ulterior motive.

Contrary to the Trustee's suggestion, the Bank's mere knowledge of Oakland's possible insolvency at the time of the set-off on June 30, 1971, is insufficient to deprive the Bank of its right of set-off. The authorities on which he relies are easily distinguishable.

In Gates v. First Nat'l Bank, 1 F.2d 820 (E.D. Va. 1924), cited at p. 25 of the Trustee's brief, deposits were made after the bankrupt suspended operations, and the defendant bank had full knowledge of this fact, primarily because an officer of the bank had been chairman of a creditors' committee. According to the court, the "[bank's] receipt of money...was with unmistakable knowledge of bankruptcy," and the bankrupt's deposits were not "made in the ordinary course of business." 1 F.2d at 823-24. No such facts are even alleged in this case, however.

Likewise, in Wilson v. Nebraska State Bank, 126 Neb. 168, 252 N.W. 921 (1934), cited at p. 25 of the Trustee's brief, an insolvent manufacturer, "with the knowledge, advice and approval of the managing officers" of the defendant bank, sold certain assets for the purpose of liquidating its affairs. 525 N.W. at 922. One day after the sale proceeds were deposited with the bank, it set off such funds against an outstanding debt of the bankrupt. Id. No such knowledge existed here prior to Oakland's deposits, however. And Oakland's deposits were numerous and frequent. Trustee's Brief, at 8-9; App. 23, 27, 31.

Merrimack Nat. Bank v. Bailey, 289 F. 468 (1st Cir.), cert. denied, 263 U.S. 704 (1923), cited at p. 25 of the Trustee's brief, is also distinguishable because the bankrupt "was being liquidated by its creditors; naturally enough, the proceeds of liquidation were deposited in various creditor banks. The understanding that no preferences should be given was, in effect, nothing but a recognition of the requirements of the law." 289 F. at 470. Unlike this case, the bankrupt was insolvent and the defendant bank knew this prior to accepting the deposits from the bankrupt. 289 F. at 469.

Similarly, in Irving Trust Co. v. Bank of America Nat. Ass'n., 68 F.2d 887 (2d Cir.), cert. denied, 292 U.S. 628 (1934), cited at p. 27 of the Trustee's brief, the bank "had no right of set-off because the deposit was received after it had reason to know of the bankrupt's insolvency and after it had forbidden withdrawals from, or certifications against, the bankrupt's account." 68 F.2d at 890 (emphasis added). Here, however, the Bank had imposed no restrictions on Oakland's account, having learned of Oakland's financial problems for the first time on June 29, 1971, after the deposits had been made by Oakland. App. at 170-71, 190-91. The Bank's set-off was made here only after it acquired notice of a possible problem. App. at 23, 190-91. Likewise, in Mechanics' and Metals Nat'l Bank v. Ernst, 231 U.S.

60 (1913), cited at page 27 of the Trustee's brief, "[t]he so-called deposit of $54,048.08 was paid in after the cashier had forbidden the payment of checks against the deposit account and therefore rightly was held to be a payment and a preference. A set-off was properly denied." 231 U.S. at 67. Such facts do not exist in this case. And there is no evidentiary basis whatsoever for the Trustee's conclusory allegation that the "set-off was not made until after the bank had forbade payment on checks in the [Glen Head] account." Trustee's Brief, at 27.

The cases cited by the Trustee have been aptly described by the court in Citizens' Nat. Bank v. Lineberger, 45 F.2d 522 (4th Cir. 1930), as follows:

> "In every case [where the set-off has been denied] it will be found that the deposits were made for the purpose and as a means of effecting payment to the bank, or that they were not deposits made in the ordinary course of business and subject to withdrawal by the depositor, as where the bankrupt had suspended business and the deposits were being made from collections under the supervision of a creditors' committee, or that there was some other circumstance that stripped them of the characteristics of deposits made in ordinary course, as where the bank had instructed that checks drawn by the depositor should not be honored."

45 F.2d at 530. Such circumstances do not exist here. There was no collusion between Oakland and the Bank, and no agreement or understanding between them to build up the Glen Head account. Indeed, Oakland could have issued and did draw checks against the funds in that account (App. 22, 30; Trustee's Brief, at 9), and there is no evidence to the contrary. Prior

to the Bank's set-off, Oakland had not suspended operations, and was doing business in the usual way. App. 191. No evidence has been offered by the Trustee to show that the Bank accepted Oakland's deposits in bad faith. The deposition of Anthony D. Famighetti, the Bank's officer with personal knowledge of the facts, refutes any suggestion that Oakland's deposits were not received by the Bank in good faith and in the ordinary course of its business.* In such circumstances,

> "It is well established that a bank deposit made in the usual course of business, subject to withdrawal by the depositor, is not a transfer of property within the meaning of the Bankruptcy Act, and is not, therefore, a preference, even though made when the depositor was insolvent. Such deposits may, upon the bankruptcy of the depositor, or prior thereto, be appropriated by the bank and applied to the payment of an existing debt of the depositor."

In re Henry C. Reusch & Co., 44 F. Supp. 677, 680 (D.N.J. 1942); accord, Bank of Commerce & Trusts v. Hatcher, 50 F.2d 719, 721 (4th Cir. 1931) ("The distinguishing characteristic

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* "Q These monies were deposited with your knowledge or without your knowledge at the time they came in?

"A Without my knowledge.

* * *

"Q Well, did you have any conversations with [the bankrupt] in this regard?

"A No."

App. at 170-71.

of such a deposit is that it creates a balance in favor of the depositor which is subject to withdrawal at his will.").

B. The Form of the Bank's Set-off Was Immaterial.

The Trustee mistakenly claims at p. 29 of his brief, without citing any authority, that "had Brede [president of the bankrupt] written a check to the bank on the obligation and had the Bank credited that check to Oakland's account, there would unquestionably have been a preferential transfer." In fact, the law is otherwise.

> "[I]f the set-off is made before bankruptcy, whether a bank charges off the deposit of its customer and applies it on the indebtedness which it holds against the customer, or whether it draws a check in the name of the customer, covering his deposit and applies it as a credit on the indebtedness, the effect is the same. The bank may exercise its right by means of having the depositor draw a check on the account, payable to the bank, for the amount of the balance then standing to his credit and the bank may then apply such check to the amount owing the bankrupt, and the transaction will be valid if made under circumstances indicating there is effort to consummate a valid set-off of the deposit."

4 Collier, Bankruptcy ¶68.18, at 939-41 (14th rev. ed. 1975) (emphasis supplied); accord, McKee v. Hood, 312 F.2d 394, 397 (5th Cir. 1963) ("Our Circuit and most of the other Circuits are committed to the view that a bank's right of set-off may be exercised through the form of accepting checks in payment of the obligation."); Murray v. Corn Exchange Bank, 31 F.2d 373, 374 (S.D.N.Y. 1927), aff'd, 31 F.2d 375 (2d Cir. 1929)

("It is...undisputed that if, instead of making a book-keeping entry to show this offset, the bank accepts the check of the insolvent against his own account in payment of the loan, this mere change in form does not make the transaction a preference."); Elliotte v. American Sav. Bank & Trust Co., 18 F.2d 460, 461 (6th Cir. 1927) ("[T]he bank had a lien... [on the deposits] and a right of set-off...the effect of which was not destroyed by the fact that the depositors' voluntary checks were taken for payments on the bank's paper, instead of applying the deposits directly thereon...."); Wilson v. Citizens' Trust Co., 233 F. 697, 699 (S.D. Ga. 1916) ("Whether the bank charges off the deposit of its customer and applies it on the indebtedness which it holds against the customer, or whether it draws a check in the name of the customer covering his deposit and applies it as a credit on the indebtedness, or whether it does neither of these things, but appeals to the law to do the same thing in effect, makes no difference as a legal proposition.").

C. There Was No Admissible Evidence of Collusion Between Oakland and the Bank in the District Court.

Counsel for the Trustee "conceded that all the evidence available to him is presently before the court...." App. 40-41. The only purported evidence of collusion between the Bank and Oakland relied on by the Trustee consists of his self-serving answers to interrogatories based on "information and belief" and his own deposition testimony as to conversa-

tions held with an employee of the bankrupt. App. 14-17. Not based on personal knowledge and inadmissible in evidence, such statements had no probative value.

> "The statements are self-serving and taken by themselves would be inadmissible in evidence.... The main reason why these answers are completely insufficient here is that they failed to conform to the requirements of subdivision (e) of Rule 56 which provides that supporting and opposing affidavits 'shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' The answers here in question were sworn to but are wholly insufficient because there is a complete failure to show that the person answering had personal knowledge or was competent to testify to any of the matters stated."

S & S Logging Co. v. Barker, 366 F.2d 617, 624-25, n.7 (9th Cir. 1966); Schwartz v. Compagnie General Transatlantique, 405 F.2d 270, 273, n.1 (2d Cir. 1968) ("Although answers to interrogatories may be considered 'so far as they are admissible under the rules of evidence,' where such answers are not based on personal knowledge, such answers have no probative force."); Maryland ex rel. Barresi v. Hatch, 198 F. Supp. 1, 2-3 (D. Conn. 1961) ("Thus, although answers to interrogatories under Rule 33 are permissible in support of the defendant's motion, they are subject to the same infirmities as an affidavit would be under 56(e). It seems perfectly evident that her answers are not based upon personal knowledge, and that she would not be competent to testify.... Her answers

have no probative value on a summary judgment motion."); Standard Rolling Mills, Inc. v. National Mineral Co., 2 F.R.D. 236, 237 (N.D.N.Y. 1942) ("The depositions contain much that is hearsay, which cannot be considered [on a motion for summary judgment].").

IV.

A PREFERENCE, IF ANY, WAS RECEIVED BY THE GUARANTOR OF THE LOAN

The Trustee contends, and the district court assumed for the purpose of the Bank's motion for summary judgment, that the deposits made by Oakland in the Glen Head account were not made in the ordinary course of Oakland's business and were made to reduce the personal liability of Herman W. Brede, president of Oakland and a guarantor of the Bank's loan to the bankrupt. App. 40; Trustee's Brief, at 26. Thus, a preferential transfer, if any, was made to Brede, the guarantor.

In Citizens' Nat. Bank v. Lineberger, 45 F.2d 522 (4th Cir. 1930), the court recognized the liability of the officers who guaranteed the loan, rather than the depository bank which acted in good faith.

> "It is suggested that the officers of the insolvent corporation should not be allowed to benefit by the deposits made in the bank. This however, is a matter which cannot affect the rights of the bank. If it could be shown that the officers made the deposits fraudulently, for the purpose of preferring themselves, or for the purpose of placing the assets of the corporation where they would secure its debts for

> which the officers were liable, the trustee in a suit against such officers could recover from them the preference which they obtained thereby."

45 F.2d at 531 (emphasis supplied). This reasoning was followed in Joseph F. Hughes & Co. v. Machen, 164 F.2d 983 (4th Cir. 1947), cert. denied, 333 U.S. 881 (1948).

> "To state the matter in brief, a bank, at or after the maturity of a note held by it, may charge it against the deposit account of its maker, and this as well when the bank knows the latter is insolvent as when it does not. If there is some one secondarily liable upon the note, as surety or indorser, its payment in full in this as in any other way releases him from any claim the bank might otherwise have upon him. Nevertheless the trustee in bankruptcy of the maker may have the right to require him to return the preference he has in effect received, if he in any way knowingly contributed to bringing about a state of things which enabled the bank to do what it did, as, for example, by procuring a deposit of the maker's funds in order that they might become subject to the bank's lien."

164 F.2d at 987, quoting Drugan v. Crabtree, 299 F. 115, 120 (4th Cir. 1924) (emphasis supplied). Cf. McKee v. Hood, 312 F.2d 394, 397-98 (5th Cir. 1963).

Assuming that the Trustee's conclusory allegations as to Oakland's motives were true, the Trustee has only shown, at most, that a claim for relief may exist against Brede, the guarantor of the Bank's loan to Oakland. The fact that Mr. Brede may have benefited from Oakland's deposits cannot affect the rights of the Bank.

V.

THE DISTRICT COURT PROPERLY HELD THAT THE TRUSTEE HAD PRESENTED NO GENUINE ISSUE FOR TRIAL

The Trustee misconstrued the function and scope of summary judgment, primarily because he had no evidence to support his allegations in opposition to the Bank's motion. Under Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In addition, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Fed. R. Civ. P. 56(e) (emphasis supplied).

The Trustee had available to him the liberal discovery procedures of the Federal Rules of Civil Procedure. He deposed Mr. Famighetti, the chief executive officer of the Bank, examined the bankrupt's president, Mr. Brede, under oath pursuant to Section 7a(10) of the Bankruptcy Act, 11 U.S.C. §25(10), served extensive interrogatories on the defendant, and obtained all documents in the possession of the Bank

relating to the transactions between Brede, Oakland and the Bank. The Trustee had ample time, therefore, to obtain the specific facts required by Fed. R. Civ. P. 56.

The propriety of summary judgment in complex litigation was discussed by the Supreme Court of the United States in First National Bank v. Cities Service Co., 391 U.S. 253 (1968). There, the plaintiff charged that the defendant was part of an international oil cartel which had effectively boycotted plaintiff's oil. The court nevertheless found that plaintiff's allegations were insufficient to withstand the defendant's motion for summary judgment. According to the court, the pleadings indicated no motive on the defendant's part to engage in an illegal conspiracy, nor did the plaintiff come forward with evidence to rebut the defendant's documented explanation that the unattractiveness of plaintiff's offer deterred defendant's purchase. The court reasoned as follows:

> "While we recognize the importance of preserving litigants' rights to a trial... we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

391 U.S. at 290. The court's reasoning is equally applicable here. Because the Trustee could not produce more than vague, conclusory allegations in opposition to the Bank's motion for

summary judgment, the district court correctly found that he would have no more convincing evidence at trial. Significantly, the Trustee "conceded that if on the law relief required the bank's involvement in the build-up of the account, and if there was nothing in the papers before the court to create a question of fact as to the bank's participation, collusion or complicity in a plan by Brede to prefer the bank over other creditors, then summary judgment would have to be granted to the defendant." App. 41. The Trustee has never pointed to any specific facts or evidentiary data to support his argument that there is a genuine issue for trial.

In Dressler v. MV Sandpiper, 331 F.2d 130 (2d Cir. 1964), this court explained the circumstances under which a "genuine" issue of fact remains for trial. There, the plaintiff commenced an admiralty action in the district court to foreclose a ship mortgage. In affirming the district court's granting of the plaintiff's motion for summary judgment, the Court of Appeals noted that Admiralty Rule 58, under which the motion was brought, "is a carbon copy of Rule 56 F.R.Civ.P.," 331 F.2d at 132, and discussed the significance of summary judgment.

> "[T]he recent amendments to Rule 56 were designed to overcome...cases, which, in the words of the [Advisory] Committee, have 'impaired the utility of the summary judgment device.' 'The very mission of the summary judgment procedure,' the Committee explained, 'is to pierce the plead-

ings and to assess the proof in order to see whether there is a genuine need for trial .... Rule 56(e) was specifically amended to provide that '[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'

"If the present case were to be decided under Civil Rule 56 as amended, it would thus seem clear that respondent's vague and conclusory allegations...would not be sufficient to forestall the award of summary judgment. The highly general assertions of [respondent's] answer to the libel, buttressed by no specific facts or evidentiary data, are hardly the sort of concrete particulars which the amendments [to Fed. R. Civ. P. 56] sought to require. See Scolnick v. Lefkowitz, 329 F.2d 716 (2d Cir. 1964); Kaplan, Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II), 77 Harv. L. Rev. 801, 825 (1964)....

"[W]e find it clear that the circumstances present here would have warranted summary relief. Indeed, if this respondent were permitted to avoid summary judgment, Rule [56] and its attempt to screen out sham issues of fact would become devoid of practical significance and would stand as but a meaningless monument to noble, if ineffectual, intentions. Litigants would be able to postpone the inevitable to another day--precisely what summary judgment was intended to avoid....

"[T]he fact that the answer here lends itself to any number of interpretations, none of which rises to evidence sufficient to contradict libelant's claim and affi-

davit, and the note and mortgage themselves, strikingly illustrates its inadequacy as a defense to a motion for summary judgment. Indeed, it is precisely because vague allegations such as the respondent's furnish virtually no assistance to a court seeking to determine whether a 'genuine' issue of fact remains for trial that [Fed. R. Civ. P. 56] requires that affidavits 'set forth such facts as would be admissible in evidence,' rather than the ambiguous and conclusory allegations commonly contained in the pleadings. Only in this way may the underlying objective of the summary judgment procedure--'to discover whether one side has no real support for its version of the facts'-- be satisfied. See Community of Roquefort v. William Faehndrich, Inc., 303 F.2d 494, 498 (2d Cir. 1962).

"Recently paying tribute to Judge Clark who himself had been critical of the 'devastating gloss' which some courts had placed on Rule 56.... Chief Justice Warren observed that under the Civil Rules, 'a law suit is a search for the truth and the tools are provided for finding out the facts before the curtain goes up on the trial.' 38 Conn. B.J. 3 (1964). The provision for summary judgment...is one of the most significant of such 'tools'; if the Rule is properly followed, a court is enabled to discover whether a need exists for the 'curtain' ever rising at all.

"Had he wished to comply with this spirit and to make this law suit 'a search for the truth,' [the defendant] had ample opportunity, not only to file a timely answer . . . but also a full and meaningful affidavit, submitting to the court the specific facts which lay behind his claim.... He has not done so....

"Under the circumstances, the award of summary judgment was entirely proper...."

331 F.2d at 132-35 (emphasis supplied). The foregoing analysis demonstrates the appropriateness of the district court's granting the Bank's motion for summary judgment. The conclusory allegations contained in the Trustee's brief do not constitute evidence, either. "A statement in a brief or in oral argument does not constitute evidence." Thornton v. United States, 493 F.2d 164, 167 (3d Cir. 1974); Smith v. Mack Trucks, Inc., 505 F.2d 1248, 1249 (9th Cir. 1974) ("Legal memoranda and oral argument, in the summary-judgment context, are not evidence, and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment.").

Most recently, this court followed First National Bank v. Cities Service Co., supra, in Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102 (2d Cir. 1975). There, in a complex Sherman Act suit, the plaintiffs argued that any decision would necessarily turn on inferences as to the defendants' motive, intent, and purpose, which could only be drawn from "a mass of circumstantial evidence." 513 F.2d at 109. Because such proof was "largely within the control of the alleged co-conspirators themselves," the plaintiffs asserted that "summary judgment is inappropriate." Id. The court rejected this argument, however, and held that summary judgement was appropriate, reasoning as follows:

"It is undoubtedly true that the remedy of summary judgment should be used sparingly..., at least where the action is based on complicated and extensive evidence,... since it is a rare case where the evidence available to both sides is fully explored before trial and where the alleged co-conspirators can establish that the evidence is not susceptible of the inferences urged by the plaintiff. However, in First National Bank v. Cities Service Co., 391 U.S. 253, 289,...(1968), the Supreme Court held that once defendants have shown 'that the facts upon which [plaintiffs] relied to support [their] allegation were not susceptible of the interpretation which [they] sought to give them' plaintiffs are obligated by Rule 56(e), F.R.Civ.P., to offer evidence supporting the inferences urged by them or else face summary judgment dismissing their complaint.

"Here summary judgment cannot be denied because of incompleteness or inconclusiveness of the factual record or because of substantial issues as to credibility.... This case has been pending for over eight years. It was begun in 1966 and pretrial discovery continued until 1973, when summary judgment motions were made. During that time over 5,000 pages of depositions were taken from all witnesses who could furnish any significant relevant testimony. The available documentary evidence has also been exhausted. Numerous affidavits and exhibits were filed, a substantial number of interrogatories were answered, defendants produced relevant documents and even the Justice Department pursued an investigation. Hence plaintiffs have had over seven years to obtain whatever proof of a conspiracy there may be in the hands of defendants. They have confronted every person employed by defendants who had occasion to pass judgment upon plaintiff's proposal and to question his motives and intentions. Moreover, they have had ample opportunity, of which they have availed themselves, to examine defendants'

files and records to search for any documents relating to the rejection of their proposals.

> "Under these circumstances, unless plaintiffs have thus far turned up evidence from the defendants or elsewhere supporting their conspiracy theory we do not see how, in the face of defendants' uncontradicted evidence negating it, trial would give them any greater opportunity to elicit from defendants and their employees evidence tending to prove it.... [citations omitted]. If the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented. See First National Bank v. Cities Service Co., supra; Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952). Even if we were to disregard the denials as incredible, plaintiffs would still be required to come forward with evidence which, viewed most favorably to them, would permit an inference of conspiracy. Absent such evidence, there is no issue for trial. 'Summary judgment cannot be defeated by the vague hope that something may turn up at trial,' Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969)."

513 F.2d at 109-10 (emphasis supplied).

This case had been pending in the district court for more than three years. During that time, the deposition of Mr. Famighetti was taken, the only officer of the Bank who could furnish relevant testimony. In addition, the Trustee examined a multitude of documents, and had more than three years to obtain whatever proof might be necessary to sustain his allegations. He had ample opportunity, of which he availed himself, to examine the Bank's files and records to search for any documents relating to his assertions. Nevertheless,

the Trustee submitted no evidence which would preclude the district court from granting the Bank's motion for summary judgment. A party opposing a motion for summary judgment, like the Trustee here, "may not defeat the motion by relying on the contentions of its pleading. Rather, it must produce 'significant probative evidence tending to support [its position].'" United States v. Pent-R-Books, Inc., 538 F.2d 519, 529 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3586 (March 1, 1977); accord, Northwestern Nat'l Ins. Co. v. Corley, 503 F.2d 224, 230 (7th Cir. 1974) ("...[R]esort to summary judgment is a 'salutary procedural device,'...utilization of which in all appropriate cases should be encouraged rather than discouraged...."); Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1972) ("[T]he rule requires that the opposing party present some evidence which supports the bald assertion that there is a dispute.... A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial.... A summary judgment motion is intended to 'smoke out' the facts so that the judge can decide if anything remains to be tried."); Cali v. Eastern Airlines, Inc., 442 F.2d 65, 71 (2d Cir. 1971) ("On this review of the summary judgment, the issue is more properly phrased as being whether Cali has succeeded by other than 'vague allegations,' ... in raising a 'genuine issue ....' We have recently had occasion to admonish courts in this jurisdiction to approach summary

judgment with less trepidation than had sometimes been displayed in the past...."); Bland v. Norfolk & Southern R. R., 406 F.2d 863, 866 (4th Cir. 1969) ("While a day in court may be a constitutional necessity when there are disputed questions of fact, the function of a motion for summary judgment is to smoke out if there is any case, i.e., any genuine dispute as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition.").

The Trustee failed to produce evidence in the district court to show that Oakland's deposits had not been received by the Bank in the ordinary course of its business, and that such deposits had not been subject to withdrawal by Oakland. Nor was there any evidence to show that the Bank was in collusion with Oakland to build up the Glen Head account. "If the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented." Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., supra, 513 F.2d at 578. Viewing the Trustee's allegations most favorably, they were, at best, no more than vague hopes.

VI.

THE DOCUMENTS OFFERED BY THE TRUSTEE WERE NOT ADMISSIBLE

The attorney for the Trustee submitted in opposition

to the Bank's motion his own affidavit ("Kunin Affidavit") in which he asserted that the three exhibits annexed thereto constituted business records of Oakland. App. 31-33. The exhibits consisted of (1) bank statements for a checking account received by Oakland from St. Clair National Bank ("St. Clair"), (2) bank statements for a payroll account received by Oakland from St. Clair, and (3) schedules found annexed to Oakland's check register, allegedly prepared by Oakland's employees (Exhibits to Appendix, Document 38, Exhibits A, B and C).

Federal Rule of Evidence 803(6) sets forth the business records exception to the hearsay rule. It provides for the admission into evidence of the following:

> "(6) Records of regularly conducted activity. - A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." (emphasis supplied).

Although this rule has partially superseded the Federal Business Records Act, 28 U.S.C. §1732(a), the principles established in cases decided under that statute are applicable here.

The rationale underlying the business records exception is the "unusual reliability of business records [which] is said to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." 2 Moore's Federal Practice Rules Pamphlet, Advisory Committee Notes 843 (1975). Therefore, in order for business records to be admissible under this exception, "(1) the records must be kept pursuant to some routine procedure designed to assure accuracy, (2) they must be created for motives that would tend to assure accuracy..., and (3) they must not themselves be mere cumulations of hearsay or uninformed opinion." Sabatino v. Curtiss Nat'l Bank, 415 F.2d 632, 637 (5th Cir. 1969), cert. denied, 396 U.S. 1057 (1970).

For evidence to be admitted under the business records exception, the proponent must lay a proper foundation showing that the records were made in the regular course of business, in order to assure their authenticity. "[T]he foundation must be laid by 'someone who is sufficiently

familiar with the business practice.' We declared that, while the foundation need not be established by one who personally makes or keeps the records, it was insufficient to rely on one who had no direct knowledge of the business practice of the company which kept the records." J. Howard Smith, Inc. v. S.S. Maranon, 501 F.2d 1275, 1278 (2d Cir. 1974), cert. denied, 420 U.S. 975 (1975) (citations omitted); accord, United States v. Leal, 509 F.2d 122, 127 (9th Cir. 1975) ("[T]he person who actually makes the records need not testify, but the requisite foundation for their admission must be laid through the testimony of someone who is sufficiently familiar with the practices of the business involved to testify that the records were made in the regular course of business and thus, to verify their authenticity."); United States v. Rosenstein, 474 F.2d 705, 710 (2d Cir. 1973) ("[S]omeone who is sufficiently familiar with the business practice must testify that these records were made as part of that practice."); Hagans v. Ellerman & Bucknall Steamship Co., 318 F.2d 563, 576 (3d Cir. 1963).

In J. Howard Smith, Inc. v. S.S. Maranon, supra, appellants sought to introduce a certificate of inspection of cargo which was prepared by a Peruvian company. The document was necessary to discharge appellant's burden of proving proper delivery. In holding that such evidence was not admissible under the business records exception on the ground

that a proper foundation had not been laid, this court reasoned as follows:

> "Appellants sought to establish the foundation through the testimony of an employee of one of the appellants who was not associated with the Peruvian firm. He had no personal knowledge of how the firm created or kept the records. Thus there was no testimony by 'someone who is sufficiently familiar with the business practice' of the record keeping company, and no adequate foundation was established."

501 F.2d at 1278 (emphasis supplied).

A foundation is not established under the business records exception merely because the records sought to be introduced have been taken from a business file, for the proponent still must "establish that... [the records] were made in the regular course of business." Hagans v. Ellerman & Bucknall Steamship Co., 318 F.2d 563, 576 (3d Cir. 1963), quoting Bisno v. United States, 299 F.2d 711, 718 (9th Cir. 1961), cert. denied, 370 U.S. 952 (1962).

In Bruce v. McClure, 220 F.2d 330 (5th Cir. 1955), a trustee in bankruptcy successfully invalidated payments made by the bankrupt corporation to a bank in order to discharge a mortgage owed by appellants on their family residence. On appeal, the court considered whether a paper purporting to be part of the corporate minutes of the bankrupt corporation was properly admitted into evidence. In concluding that the business records exception to the hearsay

rule had not been satisfied, the court noted that a proper foundation had not been laid.

> "The only evidence as to the authenticity of this paper was the testimony of the trustee that he found the minute book in the company's safe and this paper therein. He stated that he knew nothing else about it, and no other witness testified as to its authenticity."

220 F.2d at 334.

The court in McClure went on to note the general rule.

> "'The general rule is that before the books of a corporation are admissible in evidence their authenticity must be shown. It must be made to appear that they are the books of the corporation, that they have been kept as its records, and that the entries made therein were made by the proper acting officer for that purpose, or by some other person in his necessary absence.'"

220 F.2d at 335, quoting 65 A.L.R. 329, 330 (1930).

Similarly, in Cahn v. Nicholas, 408 F.2d 1 (5th Cir. 1969), the court held that corporate stock and minute books were not admissible in an action brought by a trustee in bankruptcy.

> "The predicate for their admission was the testimony of the successor trustee, formerly the assistant to the trustee, that the documents were found in the office of the corporations at the time the receivership began and continuously since were in his possession. This was not sufficient to make them admissible under 28 U.S.C.A. § 1732."

408 F.2d at 3 (emphasis supplied).

The Trustee and his attorney cannot, therefore, establish a foundation for the introduction of Oakland's check records by means of their own testimony or affidavits. They are not personally familiar with the bankrupt's past business practices, and thus do not have the direct knowledge which is required to establish the necessary foundation. It is not enough for the Trustee or his attorney to assert that they discovered the documents on the bankrupt's premises. Significantly, the Trustee failed to obtain the testimony or affidavit of a past employee of the bankrupt who did have the personal knowledge to establish the authenticity and regularity of the check records. See United States v. Leal, 509 F.2d 122, 127 (9th Cir. 1975).

Exhibits A and B to the Kunin Affidavit (the bank statements of St. Clair) are not business records of the bankrupt at all. They were prepared by St. Clair, not the bankrupt, and are business records of St. Clair. Even if they were characterized as business records of the bankrupt, however, neither the Trustee nor his attorney is competent to lay the necessary foundation for admissibility under the business records exception. St. Clair prepared the statements, and neither the Trustee nor his attorney is personally familiar with the business procedures and record-keeping matters of St. Clair.

Furthermore, Fed. R. Civ. P. 56(e) requires that "affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Consequently, the Kunin Affidavit had no probative value for purposes of the Bank's motion for summary judgment.

> "There were no affidavits on file except that the attorneys for the rival claimants appended their own affidavits to some of the pleadings. In no instance did such affidavits show that the facts were based upon the affiants' knowledge.... In fact, it is obvious that the attorneys did not have any personal knowledge of the facts and that they were not competent to testify to them. Such affidavits have no probative value on a motion for summary judgment."

Mercantile Nat'l Bank v. Franklin Life Ins. Co., 248 F.2d 57, 59 (5th Cir. 1957); Applegate v. Top Associates, Inc., 425 F.2d 92, 96-97 (2d Cir. 1970); Blossom Farm Products Co. v. Amtraco Commodity Corp., 64 F.R.D. 424, 428 (S.D.N.Y. 1974) ("The affidavit of plaintiff's counsel is deficient in all respects under this standard [of Fed. R. Civ. P. 56(e)] and has no probative value for purposes of this motion [for summary judgment]."); 6 Moore's, Federal Practice ¶56.22[1], at 56-1306 (2d ed. 1976) ("This affidavit must be made on the personal knowledge of the affiant, set forth facts that would be admissible in evidence, and show affirmatively that affiant is competent to testify to the matters stated herein.")

CONCLUSION

The judgment and order of the district court should be affirmed in all respects.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD KATZ, Trustee in Bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc.

Plaintiff-Appellant,

-against-

THE FIRST NATIONAL BANK OF GLEN HEAD,

Defendant-Appellee.

No. 76-7577

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANCES DICKSTEIN, being duly sworn, deposes and says:

1. Deponent is not a party to the above case and is over 18 years of age.

2. Deponent resides at 155 West 68th Street, New York, New York 10023.

3. On March 23, 1977, deponent served two copies of the Brief of Appellee, The First National Bank of Glen Head, upon Cohn, Carr, Korein, Kunin and Brennan, 412 Missouri Avenue, East St. Louis, Illinois 62201 and Kazlow & Kazlow, 111 Brook Street, Scarsdale, New York 10583, by depositing same enclosed in

first-class, postage paid, properly addressed wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Frances Dickstein

Frances Dickstein

Sworn to before me this
23rd day of March, 1977

Sylvia Siegel

Notary Public

SYLVIA SIEGEL
Notary Public, State of New York
No. 8990010
Qualified in Kings County
Commission Expires March 30, 1978

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

Check Applicable Box

☐ Individual Verification — in the action herein; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 19 , I served a true copy of the annexed in the following manner:

Check Applicable Box

☐ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on , 19

(Print signer's name below signature)

~~Index~~ No. 76-7577 ~~Xxxxxx~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD KATZ, Trustee in Bankruptcy
of Oakland Foundry Company of
Belleville, Illinois, Inc.

Plaintiff-Appellant,

-against-

THE FIRST NATIONAL BANK OF GLEN HEAD,

Defendant-Appellee.

AFFIDAVIT OF SERVICE BY MAIL

Attorneys for **WEIL, GOTSHAL & MANGES**
Defendant-Appellee

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022
(212) 758-7800

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* *19* *, at* *M.*

Dated:

WEIL, GOTSHAL & MANGES

Attorneys for

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022

To:

Attorney(s) for

N 912 CL